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DEC 29 A 11:00

December 23, 2008

Federal Election Commission  
Complaints Examination & Legal Administration  
Attn: Jeff S. Jordan, Supervisory Attorney  
999 E. Street, NW  
Washington, DC 20463

Re: MUR 6137

To Whom It May Concern:

Our law firm represents the respondents Informed Catholic Citizens ("ICC"), a Colorado nonprofit organization, in the matter under review ("MUR") referenced above. The MUR is in response to a complaint filed November 7, 2008 (the "Complaint"), by Freedom From Religion Foundation, Inc. ("FFRF"). We respectfully request that the Complaint be dismissed and that the Federal Election Commission ("FEC") decline to pursue any further action against the respondents.

#### I. Introduction

FFRF alleges that ICC violated federal campaign finance laws by making recorded telephone calls to Colorado citizens in October, 2008. The recorded calls identified by FFRF include a recorded call by Father Bill Carmody (the "Carmody Call") and a recorded call by former congressman Bob Beauprez (the "Beauprez Call," collectively with the Carmody Call, the

"Recorded Calls").<sup>1</sup> FFRF alleges that the messages in the Recorded Calls constitute "express advocacy," and, therefore, ICC was required to file reports with the FEC and register as a political committee.

Under federal court jurisprudence and FEC regulations, ICC asserts that the messages within the Recorded Calls do not represent express advocacy and, consequently, are not a violation of federal campaign finance laws. Specifically, ICC believes that the FEC must follow established precedent that requires a narrow definition of express advocacy. Under such a definition, the messages distributed by ICC cannot be deemed express advocacy.

Because the messages do not constitute express advocacy, ICC need not qualify for an exception as a qualified nonprofit corporation or report any independent expenditure, as suggested by FFRF. The FEC should, therefore, decline to investigate FFRF's *Complaint* any further.

## II. Argument

### A. Informed Catholic Citizens did not expressly advocate the election or defeat of a candidate.

The term "expressly advocate" has a long, 26-year history. Both federal courts and the FEC have developed a significant jurisprudence on the subject over the years. Currently, the FEC defines "expressly advocating" under 11 C.F.R. § 100.22. Only communications that fit within this definition are subject to FEC regulation under the "express advocacy" regime created by federal courts and the FEC. Section 100.22 contains two alternate provisions defining "expressly

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<sup>1</sup> An affidavit by former congressman Bob Beauprez, the president of ICC, has been attached to this *Response* and is incorporated as *Exhibit A*. The affidavit includes transcripts of both the Carmody Call (*Exhibit A-1*) and the Beauprez Call (*Exhibit A-2*).

advocating." The Recorded Calls do not fit within either provision of § 100.22, and, consequently, do not constitute a violation of federal campaign finance law for express advocacy.

1. Federal court jurisprudence requires a narrow construction of the term "expressly advocate."

Federal courts have developed a very precise meaning for the term "expressly advocate," and its related noun "express advocacy." The decisions issued by courts have subsequently led to changes in FEC regulations and enforcement.

The terms stem from the U.S. Supreme Court's 1976 ruling in *Buckley v. Valeo*.<sup>2</sup> In that case, the Court determined that the definition of "expenditure" was constitutionally vague, and therefore "to preserve the provision against invalidation on vagueness grounds, [the law] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."<sup>3</sup> Thus, the court limited regulation to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"<sup>4</sup> These words (and their synonyms) have come to be known as "express advocacy." The court further held that communications that did not contain words expressly advocating the election or defeat of a candidate were deemed "issue advocacy."<sup>5</sup>

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<sup>2</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>3</sup> *Id.* at 44.

<sup>4</sup> *Id.* at 44, n. 52.

<sup>5</sup> *Id.* at 44.

Since *Buckley*, federal courts have continued to build a jurisprudence around its central tenets, including "express advocacy." Notably, in 2000, the Tenth Circuit Court of Appeals, which has jurisdiction over Colorado organizations, used the *Buckley* framework to strike down part of Colorado's campaign finance laws. In striking down those provisions as unconstitutionally vague, the Court ruled that *Buckley's* "[d]istinction between permissible restrictions on 'express advocacy' and impermissible restrictions on 'issue advocacy' remains viable, and provides the constitutional framework for our analysis."<sup>6</sup> The Court maintained *Buckley's* narrow interpretation of express advocacy, stating that "communications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy . . ."<sup>7</sup>

2. The Recorded Calls do not constitute "expressly advocating" under § 100.22(a) because the Recorded Calls do not include specific words advocating the election or defeat of a candidate.

The first provision defining "expressly advocating" under the federal regulations, § 100.22(a), requires specific words or phrases advocating the election or defeat of a candidate.<sup>8</sup>

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<sup>6</sup> *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1188 (10th Cir. 2000).

<sup>7</sup> *Id.*

<sup>8</sup> Section 100.22(a) specifically includes any communication that:

"Uses phrases such as 'vote for the President, 're-elect your Congressman, 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' Smith for Congress,' Bill McKay in '94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote against Old hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election

This regulation closely follows the federal court jurisprudence requiring very specific language to categorize a communication as express advocacy. Indeed most of the examples are taken directly from the language of *Buckley, Federal Election Commission v. Massachusetts Citizens for Life*,<sup>9</sup> and other federal court decisions. The Recorded Calls include no specific words or phrases that meet this standard.

The complaint filed by FFRF fails to demonstrate that the Recorded Calls meet § 100.22(a)'s definition of "expressly advocating." FFRF points to ICC's statements on the records of John McCain and Barack Obama to make its allegation. This allegation seems to be based on the example derived from *MCFL*, in which the Court treated as express advocacy a statement urging voters to "'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as pro-Life or Pro-Choice."<sup>10</sup>

But FFRF's own complaint highlights the fact that the message does not include specific words that fall within this provision. Specifically, FFRF alleges that the "call ends by asking the recipient, *in effect*, to vote 'Pro-Life'<sup>11</sup> and states that the call "strongly suggests" a vote against Barack Obama. By using the phrases "*in effect*" and "strongly suggests" FFRF recognizes that it cannot point to any specific language in the message that *actually* calls for the listener to vote for

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or dissent of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'"

<sup>9</sup> *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

<sup>10</sup> *MCFL*, 479 at 243.

<sup>11</sup> *Complaint*, p. 2, emphasis added.

or against a candidate. FFRF can not point to such language, because that language does not exist anywhere in the message. Without concrete language, FFRF attempts to fall back on the idea that language can "in effect" constitute a direct call to vote Pro-Life or for or against a candidate. But that is in direct conflict with the actual language required by both the federal court jurisprudence and the FCC language. Both require that the language actually be present, and not that the message only create the an "effect."

Additionally, in FFRF's discussion of § 100.22(b), FFRF expressly *admits* that concrete words or phrases of express advocacy did not appear in the Carmody Call. By noting that "the call does not specifically say 'Vote for John McCain,' or any similar phrase, FFRF refutes its own prior argument that the Carmody Call constituted a violation under § 100.22(a). This contradiction only serves to further demonstrate that the Recorded Calls did not include any specific language that called on the listener to take action to elect or defeat any candidate.

In fact, the only call to action in the message asks the listener to "search *your* conscience carefully and consider all the information *you* deem important. And then vote like life depended on it - because it does."<sup>11</sup> Indeed, this call to action self-consciously declines to direct the listener how to vote. In contrast to the clear extrinsic direction presented in the § 100.22(a) example to "vote Pro-Life" or "vote Pro-Choice," this call to action specifically asks the listener to *make her own, intrinsic choice based on the listener's own conscience and the information the listener personally finds important.*

FFRF does not make any specific allegations about the second message, which references Bob Schaffer and Mark Udall. But that message takes a similar approach, in which the speaker

<sup>11</sup> *Exhibit A-1, Carmody Call, emphasis added.*

declines to advocate for or against a candidate. The message does not include concrete words or phrases that make a direct call to action from the listener. It very pointedly states "I'm not one of those politicians calling to tell you how to vote. You'll figure that out on your own" and "our only objective is to make sure you have all the information you need to decide who you'll be voting for."<sup>13</sup>

Because the Recorded Calls do not contain concrete phrases directing the listener to vote Pro-Life and because the only other argument presented by HPRF calls for an interpretation beyond both the federal court jurisprudence and the FEC regulatory scheme, the NRC should decline to investigate the message under § 100.22(a) any further.

3. The Recorded Calls do not constitute "expressly advocating" under § 100.22(b) because reasonable minds could find that the Recorded Calls could be interpreted to encourage action other than the election or defeat of a candidate.

The second provision under FEC regulations defining "expressly advocating," § 100.22(b), requires that a communication must only be interpreted by a reasonable person as

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<sup>13</sup> See Exhibit A-2, Carmody Call.

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advocacy of the election or defeat of a candidate.<sup>14</sup> But the Recorded Calls can easily be interpreted to encourage other action, and, consequently, are not "expressly advocating."

Section 100.22(b) closely tracks the opinion of the Ninth Circuit Court of Appeals in *Federal Election Commission v. Furgatch*.<sup>15</sup> In *Furgatch*, the Ninth Circuit defined express advocacy to include communications that "when read as a whole, and with limited reference to external events, [are] susceptible of no other reasonable interpretation but as an authorization to vote for or against a specific candidate."<sup>16</sup> It created a three-part test for this standard:

1. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning;
2. Second, speech may only be termed "advocacy" if it presents a clear plan for action;
3. Finally, it must be clear what action is advocated. Speech is not an "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.<sup>17</sup>

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<sup>14</sup> Section 100.22(b) specifically includes any communication that:

"When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as sustaining advocacy of the election or defeat of one or more clearly identified candidate(s) because -

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

<sup>15</sup> *Fed. Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

<sup>16</sup> *Furgatch*, 807 F.2d at 864.

<sup>17</sup> *Id.*



But the vast majority of federal courts reviewing the "expressly advocate" test have rejected the *Furgatch* test. Indeed, every circuit court applying the "expressly advocate" test has either declined to use or directly rejected the *Furgatch* formulation, and instead limited "expressly advocate" to specific words or phrases,<sup>18</sup> as required under § 100.22(a). Most importantly, the circuit court of jurisdiction, the Tenth Circuit, as noted above, has declined to follow the *Furgatch* test and likely would join other circuits finding § 100.22(b) unconstitutional.

Even under *Furgatch* or § 100.22(b), FFRF failed to demonstrate that ICC violated federal law. Specifically, it failed to demonstrate that the Recorded Calls can only be interpreted by a reasonable mind to present advocacy to elect or defeat a candidate.

FFRF alleges that even though "the call does not specifically say, 'Vote for John McCain,' it strongly suggests to vote against Barack Obama, who is identified as Pro-Choice." FFRF continues by noting the proximity of the Carmody Call to the election and makes the unsupported intellectual leap to the conclusion that "reasonable minds certainly could not differ as to the actions ICC was encouraging."<sup>19</sup> This analysis fails to demonstrate a violation by ICC for several reasons.

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<sup>18</sup> See *Faucher v. Fed. Election Comm'n*, 928 F.2d 468, 470-1 (1st Cir. 1991); *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2nd Cir. 1980) (en banc); *Fed. Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997); *Chamber of Commerce of U.S. v. Moore*, 288 F.3d 187, 193 (5th Cir. 2002); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000).

<sup>19</sup> See *Complaint*, p. 3.

First, the plain language of the Recorded Calls demonstrate that an interpretation other than advocacy to elect or defeat a candidate is not only possible, but was actually intended. As noted above, the Recorded Calls specifically state:

- "I'm not one of those politicians calling to tell you how to vote. You'll figure that out on your own."<sup>20</sup>
- "[O]ur only objective is to make sure you have all the information you need to decide who you'll be voting for in this election."<sup>21</sup>
- "I will pray that you will search your conscience carefully and consider all the information you deem important."<sup>22</sup>

Each of these statements make it clear that ICC intended to inform the listener and allow the listener to use the information to make their own decision. To the extent that a plea to action exists, as required under *Furgatch*, it is not a plea to vote for or against any candidate, but rather for the listener to "search your conscience carefully" and "consider all the information you deem important."

Second, FRFF alleges that the Carmody Call "strongly suggests" a vote against Obama. Again, the phrase "strongly suggests" highlights the lack of concrete language required by § 100.22(a). But it also demonstrates that the Carmody Call cannot be found in violation of § 100.22(b), either. To "strongly suggest" a course of action should be distinguished from a communication that can only be interpreted as advocacy of the election or defeat of a candidate. The clear language of § 100.22(b) mandates the message must be more than a mere suggestion,

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<sup>20</sup> See Exhibit A-2, Beauprez Call.

<sup>21</sup> See Exhibit A-2, Beauprez Call.

<sup>22</sup> See Exhibit A-1, Carmody Call.

even a strong suggestion, to constitute a violation. The election or defeat of a candidate must be the *only* interpretation of the message. Any other potential interpretations would necessarily remove the message from § 100.22(b)'s definition. Because FFRF simply interprets the Carmody Call to "strongly suggest" a vote against Obama, it stands to reason that other interpretations may exist, too. The Carmody Call, therefore, cannot be considered a violation of § 100.22(b) for this reason, either.

Third, FFRF does not correctly cite the Carmody Call, even under their own transcription. FFRF alleges that ICC identified Obama as "Pro-Choice." But the phrase "Pro-Choice" does not appear anywhere in the transcript, even as provided in the *Complaint*. The Carmody Call does quote Denver Archbishop Charles Chaput regarding Obama's record on abortion rights, but does not specifically label Obama as either Pro-Choice or Pro-Life. It appears that FFRF made this referential leap in an attempt to strengthen its case assertion that the Carmody Call could only be interpreted as a call to vote against Obama. But again, these assertions do not constitute the only interpretation a reasonable mind might make.

Finally, even under the Ninth Circuit's widely discredited *Furgatch* test, the basis for § 100.22(b), FFRF still fails to demonstrate that the Recorded Calls constituted a call to vote against Obama. The language of the advertisement in *Furgatch* is instructive. In two separate newspaper ads, the message concentrated on stopping President Carter. Specifically, the Ninth Circuit found that the ad "contains an unequivocal message that Carter must not 'succeed' in 'burden[ing]' the country with 'four more years.'"<sup>23</sup> Even more instructively, the Ninth Circuit

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<sup>23</sup> *Furgatch*, 807 F.2d at 868.

noted that "the advertisement discusses Carter, the candidate, rather than the political issues."<sup>24</sup>

The Ninth Circuit continues:

"[t]he pivotal question is not what the readers should prevent Jimmy Carter from doing, but what should do to prevent it. The words we focus on are 'don't let him.' They are simple and direct. 'Don't let him' is a command. The words 'expressly advocate' action of some kind ... Reasonable minds could not dispute that Furgatch's advertisement urged readers to vote against Jimmy Carter. This was the only action open to those who would not 'let him do it.'"<sup>25</sup>

In contrast, the Recorded Calls focus on specific issues important Catholic citizens, including the "sanctity of life, euthanasia, homosexual marriage, embryonic stem-cell research, and human cloning."<sup>26</sup> The Recorded Calls discuss the policy position of the individuals on these issues as opposed to the Furgatch ads, which focused on the candidate. The FEC attempted to further tease out candidate related messages from issue messages in its Explanation and Justification issued July 6, 1995, just before it adopted § 100.22(b).<sup>27</sup> The FEC identifies that candidate centered messages that constitute express advocacy will include discussion of their "character, qualifications, or accomplishments."<sup>28</sup> It is clear that the ad in Furgatch specifically attacks Carter's character, qualifications, and accomplishments, and would be encompassed within the class of language the FEC intended to regulate. The Recorded Calls, though, do not. They focus only on the policy position of individuals and fall outside the purview of the regulator's intent.

<sup>24</sup> *Furgatch*, 887 F.2d at 861.

<sup>25</sup> *Id.* at 864-65.

<sup>26</sup> See *Exhibit A-2*, Beauprez Call.

<sup>27</sup> See 60 Fed. Reg. 129, 35295 (Jul. 6, 1995) (to be codified at 11 C.F.R. § 100.22).

<sup>28</sup> *Id.*

Additionally, unlike *Forgetch*, and as discussed above, no clear call to action or command to vote against Obama or Udall exists. No forgone course of action is presented. To the extent that a call to action or command does exist, it is a plea to "search your conscience carefully" and "consider all the information you deem important."<sup>28</sup>

C. The term "expressly advocate" must be limited to specific words of express advocacy, in order to avoid unconstitutional vagueness.

Although this case should be properly resolved by interpreting the term "expressly advocate," FFRF's *Complaint* nonetheless raises troubling due process concerns. By asking the FEC to define "expressly advocate" in a manner beyond specific words that expressly advocate the election or defeat of a candidate, FFRF asks the FEC to create a vague, unworkable definition that violates due process.

The express advocacy test was developed by the U.S. Supreme Court to remedy an unconstitutionally vague definition of expenditure.<sup>29</sup> FFRF, however, seeks to substitute an expansive, elastic, and unknown test. But federal courts, including the Tenth Circuit, have held that the express advocacy standard is necessary to afford precision in regulating First Amendment freedoms.<sup>30</sup> These concerns remain.

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<sup>28</sup> See *Exhibit A-1*, Carmody Call.

<sup>29</sup> See *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

<sup>30</sup> *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000); *League of Women Voters v. Davidson*, 23 P.3d 1266, 1268-1269 (Colo. App. 2001).

Recently, a federal district court struck down a Utah law that resulted in "post hoc determinations" and violated both "fairness and due process."<sup>22</sup> There, the Court held that Utah's law was unconstitutionally vague because (1) it did not fall within the category of express advocacy, and (2) it was not the "functional equivalent of express advocacy," a category limited to statutes that are already "narrowly defined" by the legislature, such as the federal test for "electioneering communications."<sup>23</sup> Accordingly, the court recognized that when interpreting a statute that suffers from the "shoals of vagueness," "Buckley's express advocacy standard is still viable," and courts or the FEC need not apply a "functional equivalent" test beyond the narrow test that includes electioneering communications.<sup>24</sup>

Here, the Tenth Circuit's narrow "express advocacy" test is still required. Otherwise, the test becomes open-ended and multi-factored. Accordingly, the FEC must apply the well-formulated, narrow "express advocacy" test, because "such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant government interest."<sup>25</sup>

Without belaboring the point, recent decisions from other circuits have repeated that the express advocacy test is not merely a matter of statutory interpretation for courts, but rather is necessary to "ensure that campaign finance restrictions do not sweep so broadly as to restrict

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<sup>22</sup> *Nat'l Right to Work Legal Defense and Educ. Found., Inc. v. Herbert*, 2008 WL 4181336 \*16 (D. Utah, 2008).

<sup>23</sup> *Id.* at 15.

<sup>24</sup> *Id.* at 16.

<sup>25</sup> *Anderson v. Spear*, 356 F.3d 651, 664-665 (6th Cir. 2004).

ordinary political speech."<sup>26</sup> Failure by the FEC to follow the precedent set by federal courts would undermine this core political speech protected by the First Amendment.

### III. Conclusion

The Recorded Calls made by ICC do not constitute "expressly advocating" the election or defeat of a candidate under federal court jurisprudence or 11 C.F.R. §§ 100.22(a) or 100.22(b).

Because the Recorded Calls were not "expressly advocating" the election or defeat of a candidate, ICC was under no obligation to either prove an exception as a qualified nonprofit corporation or to file an independent expenditure report with the FEC. The FEC should, therefore, dismiss the Complaint and decline to pursue any further investigation of ICC.

Respectfully submitted this 24<sup>th</sup> day of December 2008.



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<sup>26</sup> *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

Hello, this is Fr. Bill Carmody, Pastor of Holy Family parish in Colorado Springs. I'm calling on behalf of Informed Catholic Citizens about the importance of your vote in this election.

Regardless of the spinning that some politicians have done, the Catholic Church's opposition to the evil of abortion has always been the same and is crystal clear.

Why is it important in this election? John McCain has a record of supporting life, but in the words of Denver Archbishop Charles Chaput, Barack Obama "is the most committed abortion-rights presidential candidate of either major party" in 35 years, and the Democratic Party platform adopted in Denver is "clearly anti-life."

There are many important issues to consider, but as Archbishop Chaput says, "every other human right depends on the right to life."

If you have not already voted, I pray that you will search your conscience carefully and consider all the information you deem important. And, then vote like life depended on it - because it does.

This message is paid for by Informed Catholic Citizens.

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Hello, this is Bob Beauprez. And, no, I'm not one of those politicians calling to tell you how to vote. You'll figure that out on your own.

I know that there are a whole host of issues you'll consider when deciding for whom to vote, including who best represents your values. What's difficult is finding really honest information about the candidates and the issues most important to you - like the five non-negotiables: sanctity of life, euthanasia, homosexual marriage, embryonic stem-cell research, and human cloning.

I recently learned through the Solidarity Institute at [ecatholic.org](http://ecatholic.org) that Bob Schaffer is in agreement with Catholic doctrine on all five of these issues while Mark Udall is opposed to every single one.

We're the Informed Catholic Citizens, and our only objective is to make sure you have all the information you need to decide who you'll be voting for in this election. Thank you for listening.

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